

[STAFF WORKING DRAFT]

APRIL 7, 2003

108TH CONGRESS
1ST SESSION

S. ———

To regulate interstate commerce by imposing limitations and penalties on the transmission of unsolicited commercial electronic mail via the internet.

IN THE SENATE OF THE UNITED STATES

APRIL ———, 2003

Mr. BURNS (for himself and Mr. WYDEN) introduced the following bill; which was read twice and referred to the Committee on —————

A BILL

To regulate interstate commerce by imposing limitations and penalties on the transmission of unsolicited commercial electronic mail via the internet.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Controlling the Assault
5 of Non-Solicited Pornography and Marketing Act of
6 2003”, or the “CAN-SPAM Act of 2003”.

1 **SEC. 2. CONGRESSIONAL FINDINGS AND POLICY.**

2 (a) FINDINGS.—The Congress finds the following:

3 (1) There is a right of free speech on the Inter-
4 net.

5 (2) The Internet has increasingly become a crit-
6 ical mode of global communication and now presents
7 unprecedented opportunities for the development and
8 growth of global commerce and an integrated world-
9 wide economy.

10 (3) In order for global commerce on the Inter-
11 net to reach its full potential, individuals and enti-
12 ties using the Internet and other online services
13 should be prevented from engaging in activities that
14 prevent other users and Internet service providers
15 from having a reasonably predictable, efficient, and
16 economical online experience.

17 (4) Unsolicited commercial electronic mail can
18 be a mechanism through which businesses advertise
19 and attract customers in the online environment.

20 (5) The receipt of unsolicited commercial elec-
21 tronic mail may result in costs to recipients who
22 cannot refuse to accept such mail and who incur
23 costs for the storage of such mail, or for the time
24 spent accessing, reviewing, and discarding such mail,
25 or for both.

1 (6) Unsolicited commercial electronic mail may
2 impose significant monetary costs on providers of
3 Internet access services, businesses, and educational
4 and nonprofit institutions that carry and receive
5 such mail, as there is a finite volume of mail that
6 such providers, businesses, and institutions can han-
7 dle without further investment in infrastructure.

8 (7) Some unsolicited commercial electronic mail
9 contains material that many recipients may consider
10 vulgar or pornographic in nature.

11 (8) While some senders of unsolicited commer-
12 cial electronic mail messages provide simple and reli-
13 able ways for recipients to reject (or “opt-out” of)
14 receipt of unsolicited commercial electronic mail
15 from such senders in the future, other senders pro-
16 vide no such “opt-out” mechanism, or refuse to
17 honor the requests of recipients not to receive elec-
18 tronic mail from such senders in the future, or both.

19 (9) An increasing number of senders of unsolic-
20 ited commercial electronic mail purposefully disguise
21 the source of such mail so as to prevent recipients
22 from responding to such mail quickly and easily.

23 (10) An increasing number of senders of unso-
24 licited commercial electronic mail purposefully in-
25 clude misleading information in the message’s sub-

1 ject lines in order to induce the recipients to view
2 the messages.

3 (11) In legislating against certain abuses on the
4 Internet, Congress should be very careful to avoid
5 infringing in any way upon constitutionally protected
6 rights, including the rights of assembly, free speech,
7 and privacy.

8 (b) CONGRESSIONAL DETERMINATION OF PUBLIC
9 POLICY.—On the basis of the findings in subsection (a),
10 the Congress determines that—

11 (1) there is a substantial government interest in
12 regulation of unsolicited commercial electronic mail;

13 (2) senders of unsolicited commercial electronic
14 mail should not mislead recipients as to the source
15 or content of such mail; and

16 (3) recipients of unsolicited commercial elec-
17 tronic mail have a right to decline to receive addi-
18 tional unsolicited commercial electronic mail from
19 the same source.

20 **SEC. 3. DEFINITIONS.**

21 In this Act:

22 (1) AFFIRMATIVE CONSENT.—The term “af-
23 firmative consent”, when used with respect to a
24 commercial electronic mail message, means that the
25 recipient has expressly consented to receive the mes-

1 sage, either in response to a clear and conspicuous
2 request for such consent or at the recipient's own
3 initiative.

4 (2) COMMERCIAL ELECTRONIC MAIL MES-
5 SAGE.—

6 (A) IN GENERAL.—The term “commercial
7 electronic mail message” means any electronic
8 mail message the primary purpose of which is
9 the commercial advertisement or promotion of a
10 commercial product or service (including con-
11 tent on an Internet website operated for a com-
12 mercial purpose).

13 (B) REFERENCE TO COMPANY OR
14 WEBSITE.—The inclusion of a reference to a
15 commercial entity or a link to the website of a
16 commercial entity in an electronic mail message
17 does not, by itself, cause such message to be
18 treated as a commercial electronic mail message
19 for purposes of this Act if the contents or cir-
20 cumstances of the message indicate a primary
21 purpose other than commercial advertisement
22 or promotion of a commercial product or serv-
23 ice.

24 (3) COMMISSION.—The term “Commission”
25 means the Federal Trade Commission.

1 (4) DOMAIN NAME.—The term “domain name”
2 means any alphanumeric designation which is reg-
3 istered with or assigned by any domain name reg-
4 istrar, domain name registry, or other domain name
5 registration authority as part of an electronic ad-
6 dress on the Internet.

7 (5) ELECTRONIC MAIL ADDRESS.—The term
8 “electronic mail address” means a destination, com-
9 monly expressed as a string of characters, consisting
10 of a unique user name or mailbox (commonly re-
11 ferred to as the “local part”) and a reference to an
12 Internet domain (commonly referred to as the “do-
13 main part”), to which an electronic mail message
14 can be sent or delivered.

15 (6) ELECTRONIC MAIL MESSAGE.—The term
16 “electronic mail message” means a message sent to
17 an electronic mail address.

18 (7) FTC ACT.—The term “FTC Act” means
19 the Federal Trade Commission Act (15 U.S.C. 41 et
20 seq.).

21 (8) HEADER INFORMATION.—The term “header
22 information” means the source, destination, and
23 routing information attached to an electronic mail
24 message, including the originating domain name and
25 originating electronic mail address.

1 (9) IMPLIED CONSENT.—The term “implied
2 consent”, when used with respect to a commercial
3 electronic mail message, means that—

4 (A) within the 3-year period ending upon
5 receipt of such message, there has been a busi-
6 ness transaction between the sender and the re-
7 cipient (including a transaction involving the
8 provision, free of charge, of information, goods,
9 or services requested by the recipient); and

10 (B) the recipient was, at the time of such
11 transaction or thereafter in the first electronic
12 mail message received from the sender after the
13 effective date of this Act, provided a clear and
14 conspicuous notice of an opportunity not to re-
15 ceive unsolicited commercial electronic mail
16 messages from the sender and has not exercised
17 such opportunity.

18 If a sender operates through separate lines of busi-
19 ness or divisions and holds itself out to the recipient,
20 both at the time of the transaction described in sub-
21 paragraph (A) and at the time the notice under sub-
22 paragraph (B) was provided to the recipient, as that
23 particular line of business or division rather than as
24 the entity of which such line of business or division
25 is a part, then the line of business or the division

1 shall be treated as the sender for purposes of this
2 paragraph.

3 (10) INITIATE.—The term “initiate”, when
4 used with respect to a commercial electronic mail
5 message, means to originate such message or to pro-
6 cure the origination of such message, but shall not
7 include actions that constitute routine conveyance of
8 such message.

9 (11) INTERNET.—The term “Internet” has the
10 meaning given that term in the Internet Tax Free-
11 dom Act (47 U.S.C. 151 nt).

12 (12) INTERNET ACCESS SERVICE.—The term
13 “Internet access service” has the meaning given that
14 term in section 231(e)(4) of the Communications
15 Act of 1934 (47 U.S.C. 231(e)(4)).

16 (13) PROTECTED COMPUTER.—The term “pro-
17 tected computer” has the meaning given that term
18 in section 1030(e)(2) of title 18, United States
19 Code.

20 (14) RECIPIENT.—The term “recipient”, when
21 used with respect to a commercial electronic mail
22 message, means an authorized user of the electronic
23 mail address to which the message was sent or deliv-
24 ered. If a recipient of a commercial electronic mail
25 message has 1 or more electronic mail addresses in

1 addition to the address to which the message was
2 sent or delivered, the recipient shall be treated as a
3 separate recipient with respect to each such address.
4 If an electronic mail address is reassigned to a new
5 user, the new user shall not be treated as a recipient
6 of any commercial electronic mail message sent or
7 delivered to that address before it was reassigned.

8 (15) ROUTINE CONVEYANCE.—The term “rou-
9 tine conveyance” means the transmission, routing,
10 relaying, handling, or storing, through an automatic
11 technical process, of an electronic mail message for
12 which another person has provided and selected the
13 recipient addresses.

14 (16) SENDER.—The term “sender”, when used
15 with respect to a commercial electronic mail mes-
16 sage, means a person who initiates such a message
17 and whose product, service, or Internet web site is
18 advertised or promoted by the message.

19 (17) TRANSACTIONAL OR RELATIONSHIP MES-
20 SAGES.—The term “transactional or relationship
21 message” means an electronic mail message the pri-
22 mary purpose of which is to facilitate, complete, con-
23 firm, provide, or request information concerning—

1 (A) a commercial transaction that the re-
2 cipient has previously agreed to enter into with
3 the sender;

4 (B) an existing commercial relationship,
5 formed with or without an exchange of consid-
6 eration, involving the ongoing purchase or use
7 by the recipient of products or services offered
8 by the sender; or

9 (C) an existing employment relationship or
10 related benefit plan.

11 (18) UNSOLICITED COMMERCIAL ELECTRONIC
12 MAIL MESSAGE.—The term “unsolicited commercial
13 electronic mail message” means any commercial
14 electronic mail message that—

15 (A) is not a transactional or relationship
16 message; and

17 (B) is sent to a recipient without the re-
18 cipient’s prior affirmative or implied consent.

19 **SEC. 4. CRIMINAL PENALTY FOR UNSOLICITED COMMER-**
20 **CIAL ELECTRONIC MAIL CONTAINING FRAUD-**
21 **ULENT ROUTING INFORMATION.**

22 (a) IN GENERAL.—Chapter 63 of title 18, United
23 States Code, is amended by adding at the end the fol-
24 lowing:

1 **“§ 1351. Unsolicited commercial electronic mail con-**
2 **taining fraudulent transmission informa-**
3 **tion**

4 “(a) IN GENERAL.—Any person who initiates the
5 transmission, to a protected computer in the United
6 States, of an unsolicited commercial electronic mail mes-
7 sage, with knowledge and intent that the message contains
8 or is accompanied by header information that is materially
9 false or materially misleading shall be fined or imprisoned
10 for not more than 1 year, or both, under this title. For
11 purposes of this subsection, header information that is
12 technically accurate but includes an originating electronic
13 mail address the access to which for purposes of initiating
14 the message was obtained by means of false or fraudulent
15 pretenses or representations shall be considered materially
16 misleading.

17 “(b) DEFINITIONS.—Any term used in subsection (a)
18 that is defined in section 3 of the CAN-SPAM Act of 2003
19 has the meaning given it in that section.”.

20 (b) CONFORMING AMENDMENT.—The chapter anal-
21 ysis for chapter 63 of title 18, United States Code, is
22 amended by adding at the end the following:

“1351. Unsolicited commercial electronic mail containing fraudulent routing in-
formation”.

1 **SEC. 5. OTHER PROTECTIONS AGAINST UNSOLICITED COM-**
2 **MERCIAL ELECTRONIC MAIL.**

3 (a) REQUIREMENTS FOR TRANSMISSION OF MES-
4 SAGES.—

5 (1) PROHIBITION OF FALSE OR MISLEADING
6 TRANSMISSION INFORMATION.—It is unlawful for
7 any person to initiate the transmission, to a pro-
8 tected computer, of a commercial electronic mail
9 message that contains, or is accompanied by, header
10 information that is materially or intentionally false
11 or materially or intentionally misleading. For pur-
12 poses of this paragraph, header information that is
13 technically accurate but includes an originating elec-
14 tronic mail address the access to which for purposes
15 of initiating the message was obtained by means of
16 false or fraudulent pretenses or representations shall
17 be considered materially misleading.

18 (2) PROHIBITION OF DECEPTIVE SUBJECT
19 HEADINGS.—It is unlawful for any person to initiate
20 the transmission to a protected computer of a com-
21 mercial electronic mail message with a subject head-
22 ing that such person knows would be likely to mis-
23 lead a recipient, acting reasonably under the cir-
24 cumstances, about a material fact regarding the con-
25 tents or subject matter of the message.

1 (3) INCLUSION OF RETURN ADDRESS OR COM-
2 PARABLE MECHANISM IN UNSOLICITED COMMERCIAL
3 ELECTRONIC MAIL.—

4 (A) IN GENERAL.—It is unlawful for any
5 person to initiate the transmission to a pro-
6 tected computer of an unsolicited commercial
7 electronic mail message that does not contain a
8 functioning return electronic mail address or
9 other Internet-based mechanism, clearly and
10 conspicuously displayed, that—

11 (i) a recipient may use to submit, in
12 a manner specified by the sender, a reply
13 electronic mail message or other form of
14 Internet-based communication requesting
15 not to receive any future unsolicited com-
16 mercial electronic mail messages from that
17 sender at the electronic mail address where
18 the message was received; and

19 (ii) remains capable of receiving such
20 messages or communications for no less
21 than 30 days after the transmission of the
22 original message.

23 (B) MORE DETAILED OPTIONS POS-
24 SIBLE.—The sender of an unsolicited commer-
25 cial electronic mail message may comply with

1 subparagraph (A)(i) by providing the recipient
2 a list or menu from which the recipient may
3 choose the specific types of commercial elec-
4 tronic mail messages the recipient wants to re-
5 ceive or does not want to receive from the send-
6 er, if the list or menu includes an option under
7 which the recipient may choose not to receive
8 any unsolicited commercial electronic mail mes-
9 sages from the sender.

10 (C) TEMPORARY INABILITY TO RECEIVE
11 MESSAGES OR PROCESS REQUESTS.—A return
12 electronic mail address or other mechanism
13 does not fail to satisfy the requirements of sub-
14 paragraph (A) if it is unexpectedly and tempo-
15 rarily unable to receive messages or process re-
16 quests due to technical or capacity problems, if
17 the problem with receiving messages or proc-
18 essing requests is corrected within a reasonable
19 time period.

20 (4) PROHIBITION OF TRANSMISSION OF UNSO-
21 LICITED COMMERCIAL ELECTRONIC MAIL AFTER OB-
22 JECTION.—If a recipient makes a request to a send-
23 er, using a mechanism provided pursuant to para-
24 graph (3), not to receive some or any unsolicited

1 commercial electronic mail messages from such send-
2 er, then it is unlawful—

3 (A) for the sender to initiate the trans-
4 mission to the recipient, more than 10 business
5 days after the receipt of such request, of an un-
6 solicited commercial electronic mail message
7 that falls within the scope of the request;

8 (B) for any person acting on behalf of the
9 sender to initiate the transmission to the recipi-
10 ent, more than 10 business days after the re-
11 ceipt of such request, of an unsolicited commer-
12 cial electronic mail message that such person
13 knows or consciously avoids knowing falls with-
14 in the scope of the request; or

15 (C) for any person acting on behalf of the
16 sender to assist in initiating the transmission to
17 the recipient, through the provision or selection
18 of addresses to which the message will be sent,
19 of an unsolicited commercial electronic mail
20 message that the person knows, or consciously
21 avoids knowing, would violate subparagraph (A)
22 or (B).

23 (5) INCLUSION OF IDENTIFIER, OPT-OUT, AND
24 PHYSICAL ADDRESS IN UNSOLICITED COMMERCIAL
25 ELECTRONIC MAIL.—It is unlawful for any person to

1 initiate the transmission of any unsolicited commer-
2 cial electronic mail message to a protected computer
3 unless the message provides—

4 (A) clear and conspicuous identification
5 that the message is an advertisement or solici-
6 tation;

7 (B) clear and conspicuous notice of the op-
8 portunity under paragraph (3) to decline to re-
9 ceive further unsolicited commercial electronic
10 mail messages from the sender; and

11 (C) a valid physical postal address of the
12 sender.

13 (b) PROHIBITION OF TRANSMISSION OF UNLAWFUL
14 UNSOLICITED COMMERCIAL ELECTRONIC MAIL TO CER-
15 TAIN HARVESTED ELECTRONIC MAIL ADDRESSES.—

16 (1) IN GENERAL.—It is unlawful for any person
17 to initiate the transmission, to a protected computer,
18 of an unsolicited commercial electronic mail message
19 that is unlawful under subsection (a), or to assist in
20 the origination of such a message through the provi-
21 sion or selection of addresses to which the message
22 will be sent, if such person knows that, or acts with
23 reckless disregard as to whether—

24 (A) the electronic mail address of the re-
25 cipient was obtained, using an automated

1 means, from an Internet website or proprietary
2 online service operated by another person; or

3 (B) the website or proprietary online serv-
4 ice from which the address was obtained in-
5 cluded, at the time the address was obtained, a
6 notice stating that the operator of such a
7 website or proprietary online service will not
8 give, sell, or otherwise transfer addresses main-
9 tained by such site or service to any other party
10 for the purpose of initiating, or enabling others
11 to initiate, unsolicited electronic mail messages.

12 (2) DISCLAIMER.—Nothing in this subsection
13 creates an ownership or proprietary interest in such
14 electronic mail addresses.

15 (c) COMPLIANCE PROCEDURES.—An action for viola-
16 tion of paragraph (2), (3), (4), or (5) of subsection (a)
17 may not proceed if the person against whom the action
18 is brought demonstrates that —

19 (1) the person has established and imple-
20 mented, with due care, reasonable practices and pro-
21 cedures to effectively prevent violations of such para-
22 graph; and

23 (2) the violation occurred despite good faith ef-
24 forts to maintain compliance with such practices and
25 procedures.

1 **SEC. 6. ENFORCEMENT BY FEDERAL TRADE COMMISSION.**

2 (a) VIOLATION IS UNFAIR OR DECEPTIVE ACT OR
3 PRACTICE.—Except as provided in subsection (b), this Act
4 shall be enforced by the Commission as if the violation
5 of this Act were an unfair or deceptive act or practice pro-
6 scribed under section 18(a)(1)(B) of the Federal Trade
7 Commission Act (15 U.S.C. 57a(a)(1)(B)).

8 (b) ENFORCEMENT BY CERTAIN OTHER AGEN-
9 CIES.—Compliance with this Act shall be enforced—

10 (1) under section 8 of the Federal Deposit In-
11 surance Act (12 U.S.C. 1818), in the case of—

12 (A) national banks, and Federal branches
13 and Federal agencies of foreign banks, and any
14 subsidiaries of such entities (except brokers,
15 dealers, persons providing insurance, invest-
16 ment companies, and investment advisers), by
17 the Office of the Comptroller of the Currency;

18 (B) member banks of the Federal Reserve
19 System (other than national banks), branches
20 and agencies of foreign banks (other than Fed-
21 eral branches, Federal agencies, and insured
22 State branches of foreign banks), commercial
23 lending companies owned or controlled by for-
24 eign banks, organizations operating under sec-
25 tion 25 or 25A of the Federal Reserve Act (12
26 U.S.C. 601 and 611), and bank holding compa-

1 nies and their nonbank subsidiaries or affiliates
2 (except brokers, dealers, persons providing in-
3 surance, investment companies, and investment
4 advisers), by the Board;

5 (C) banks insured by the Federal Deposit
6 Insurance Corporation (other than members of
7 the Federal Reserve System) insured State
8 branches of foreign banks, and any subsidiaries
9 of such entities (except brokers, dealers, per-
10 sons providing insurance, investment compa-
11 nies, and investment advisers), by the Board of
12 Directors of the Federal Deposit Insurance Cor-
13 poration; and

14 (D) savings associations the deposits of
15 which are insured by the Federal Deposit In-
16 surance Corporation, and any subsidiaries of
17 such savings associations (except brokers, deal-
18 ers, persons providing insurance, investment
19 companies, and investment advisers), by the Di-
20 rector of the Office of Thrift Supervision;

21 (2) under the Federal Credit Union Act (12
22 U.S.C. 1751 et seq.) by the Board of the National
23 Credit Union Administration with respect to any
24 Federally insured credit union, and any subsidiaries
25 of such a credit union;

1 (3) under the Securities Exchange Act of 1934
2 (15 U.S.C. 78a et seq.) by the Securities and Ex-
3 change Commission with respect to any broker or
4 dealer;

5 (4) under the Investment Company Act of 1940
6 (15 U.S.C. 80a-1 et seq.) by the Securities and Ex-
7 change Commission with respect to investment com-
8 panies;

9 (5) under the Investment Advisers Act of 1940
10 (15 U.S.C. 80b-1 et seq.) by the Securities and Ex-
11 change Commission with respect to investment ad-
12 visers registered under that Act;

13 (6) under State insurance law in the case of
14 any person engaged in providing insurance, by the
15 applicable State insurance authority of the State in
16 which the person is domiciled, subject to section 104
17 of the Gramm-Bliley-Leach Act (15 U.S.C. 6701);

18 (7) under part A of subtitle VII of title 49,
19 United States Code, by the Secretary of Transpor-
20 tation with respect to any air carrier or foreign air
21 carrier subject to that part;

22 (8) under the Packers and Stockyards Act,
23 1921 (7 U.S.C. 181 et seq.) (except as provided in
24 section 406 of that Act (7 U.S.C. 226, 227)), by the

1 Secretary of Agriculture with respect to any activi-
2 ties subject to that Act;

3 (9) under the Farm Credit Act of 1971 (12
4 U.S.C. 2001 et seq.) by the Farm Credit Adminis-
5 tration with respect to any Federal land bank, Fed-
6 eral land bank association, Federal intermediate
7 credit bank, or production credit association; and

8 (10) under the Communications Act of 1934
9 (47 U.S.C. 151 et seq.) by the Federal Communica-
10 tions Commission with respect to any person subject
11 to the provisions of that Act.

12 (c) EXERCISE OF CERTAIN POWERS.—For the pur-
13 pose of the exercise by any agency referred to in sub-
14 section (b) of its powers under any Act referred to in that
15 subsection, a violation of this Act is deemed to be a viola-
16 tion of a requirement imposed under that Act. In addition
17 to its powers under any provision of law specifically re-
18 ferred to in subsection (b), each of the agencies referred
19 to in that subsection may exercise, for the purpose of en-
20 forcing compliance with any requirement imposed under
21 this Act, any other authority conferred on it by law.

22 (d) ACTIONS BY THE COMMISSION.—The Commis-
23 sion shall prevent any person from violating this Act in
24 the same manner, by the same means, and with the same
25 jurisdiction, powers, and duties as though all applicable

1 terms and provisions of the Federal Trade Commission
2 Act (15 U.S.C. 41 et seq.) were incorporated into and
3 made a part of this Act. Any entity that violates any provi-
4 sion of that subtitle is subject to the penalties and entitled
5 to the privileges and immunities provided in the Federal
6 Trade Commission Act in the same manner, by the same
7 means, and with the same jurisdiction, power, and duties
8 as though all applicable terms and provisions of the Fed-
9 eral Trade Commission Act were incorporated into and
10 made a part of that subtitle.

11 (e) ENFORCEMENT BY STATES.—

12 (1) CIVIL ACTION.—In any case in which the
13 attorney general of a State has reason to believe
14 that an interest of the residents of that State has
15 been or is threatened or adversely affected by any
16 person engaging in a practice that violates section 5
17 of this Act, the State, as *parens patriae*, may bring
18 a civil action on behalf of the residents of the State
19 in a district court of the United States of appro-
20 priate jurisdiction or in any other court of com-
21 petent jurisdiction—

22 (A) to enjoin further violation of section 5
23 of this Act by the defendant; or

1 (B) to obtain damages on behalf of resi-
2 dents of the State, in an amount equal to the
3 greater of—

4 (i) the actual monetary loss suffered
5 by such residents; or

6 (ii) the amount determined under
7 paragraph (2).

8 (2) STATUTORY DAMAGES.—

9 (A) IN GENERAL.—For purposes of para-
10 graph (1)(B)(ii), the amount determined under
11 this paragraph is the amount calculated by mul-
12 tiplying the number of willful, knowing, or neg-
13 ligent violations by an amount, in the discretion
14 of the court, of up to \$10 (with each separately
15 addressed unlawful message received by such
16 residents treated as a separate violation). In de-
17 termining the per-violation penalty under this
18 subparagraph, the court shall take into account
19 the degree of culpability, any history of prior
20 such conduct, ability to pay, the extent of eco-
21 nomic gain resulting from the violation, and
22 such other matters as justice may require.

23 (B) LIMITATION.—For any violation of
24 section 5 (other than section 5(a)(1)), the
25 amount determined under subparagraph (A)

1 may not exceed \$500,000, except that if the
2 court finds that the defendant committed the
3 violation willfully and knowingly, the court may
4 increase the limitation established by this para-
5 graph from \$500,000 to an amount not to ex-
6 ceed \$1,500,000.

7 (3) ATTORNEY FEES.—In the case of any suc-
8 cessful action under paragraph (1), the State shall
9 be awarded the costs of the action and reasonable
10 attorney fees as determined by the court.

11 (4) RIGHTS OF FEDERAL REGULATORS.—The
12 State shall serve prior written notice of any action
13 under paragraph (1) upon the Federal Trade Com-
14 mission or the appropriate Federal regulator deter-
15 mined under subsection (b) and provide the Commis-
16 sion or appropriate Federal regulator with a copy of
17 its complaint, except in any case in which such prior
18 notice is not feasible, in which case the State shall
19 serve such notice immediately upon instituting such
20 action. The Federal Trade Commission or appro-
21 priate Federal regulator shall have the right—

22 (A) to intervene in the action;

23 (B) upon so intervening, to be heard on all
24 matters arising therein;

1 (C) to remove the action to the appropriate
2 United States district court; and

3 (D) to file petitions for appeal.

4 (5) CONSTRUCTION.—For purposes of bringing
5 any civil action under paragraph (1), nothing in this
6 Act shall be construed to prevent an attorney gen-
7 eral of a State from exercising the powers conferred
8 on the attorney general by the laws of that State
9 to—

10 (A) conduct investigations;

11 (B) administer oaths or affirmations; or

12 (C) compel the attendance of witnesses or
13 the production of documentary and other evi-
14 dence.

15 (6) VENUE; SERVICE OF PROCESS.—

16 (A) VENUE.—Any action brought under
17 paragraph (1) may be brought in the district
18 court of the United States that meets applicable
19 requirements relating to venue under section
20 1391 of title 28, United States Code.

21 (B) SERVICE OF PROCESS.—In an action
22 brought under paragraph (1), process may be
23 served in any district in which the defendant—

24 (i) is an inhabitant; or

1 (ii) maintains a physical place of busi-
2 ness.

3 (7) LIMITATION ON STATE ACTION WHILE FED-
4 ERAL ACTION IS PENDING.—If the Commission or
5 other appropriate Federal agency under subsection
6 (b) has instituted a civil action or an administrative
7 action for violation of this Act, no State attorney
8 general may bring an action under this subsection
9 during the pendency of that action against any de-
10 fendant named in the complaint of the Commission
11 or the other agency for any violation of this Act al-
12 leged in the complaint.

13 (f) ACTION BY PROVIDER OF INTERNET ACCESS
14 SERVICE.—

15 (1) ACTION AUTHORIZED.—A provider of Inter-
16 net access service adversely affected by a violation of
17 section 5 may bring a civil action in any district
18 court of the United States with jurisdiction over the
19 defendant, or in any other court of competent juris-
20 diction, to—

21 (A) enjoin further violation by the defend-
22 ant; or

23 (B) recover damages in an amount equal
24 to the greater of—

1 (i) actual monetary loss incurred by
2 the provider of Internet access service as a
3 result of such violation; or

4 (ii) the amount determined under
5 paragraph (2).

6 (2) STATUTORY DAMAGES.—

7 (A) IN GENERAL.—For purposes of para-
8 graph (1)(B)(ii), the amount determined under
9 this paragraph is the amount calculated by mul-
10 tiplying the number of willful, knowing, or neg-
11 ligent violations by an amount, in the discretion
12 of the court, of up to \$10 (with each separately
13 addressed unlawful message carried over the fa-
14 cilities of the provider of Internet access service
15 or sent to an electronic mail address obtained
16 from the provider of Internet access service in
17 violation of section 5(b) treated as a separate
18 violation). In determining the per-violation pen-
19 alty under this subparagraph, the court shall
20 take into account the degree of culpability, any
21 history of prior such conduct, ability to pay, the
22 extent of economic gain resulting from the vio-
23 lation, and such other matters as justice may
24 require.

1 (B) LIMITATION.—For any violation of
2 section 5 (other than section 5(a)(1)), the
3 amount determined under subparagraph (A)
4 may not exceed \$500,000, except that if the
5 court finds that the defendant committed the
6 violation willfully and knowingly, the court may
7 increase the limitation established by this para-
8 graph from \$500,000 to an amount not to ex-
9 ceed \$1,500,000.

10 (3) ATTORNEY FEES.—In any action brought
11 pursuant to paragraph (1), the court may, in its dis-
12 cretion, require an undertaking for the payment of
13 the costs of such action, and assess reasonable costs,
14 including reasonable attorneys' fees, against any
15 party.

16 **SEC. 7. EFFECT ON OTHER LAWS.**

17 (a) FEDERAL LAW.—

18 (1) Nothing in this Act shall be construed to
19 impair the enforcement of section 223 or 231 of the
20 Communications Act of 1934 (47 U.S.C. 223 or
21 231, respectively), chapter 71 (relating to obscenity)
22 or 110 (relating to sexual exploitation of children) of
23 title 18, United States Code, or any other Federal
24 criminal statute.

1 (2) Nothing in this Act shall be construed to af-
2 fect in any way the Commission's authority to bring
3 enforcement actions under FTC Act for materially
4 false or deceptive representations in commercial elec-
5 tronic mail messages.

6 (b) STATE LAW.—

7 (1) IN GENERAL.—This Act supersedes any
8 State or local government statute, regulation, or rule
9 regulating the use of electronic mail to send com-
10 mercial messages.

11 (2) EXCEPTIONS.—Except as provided in para-
12 graph (3), this Act does not supersede or pre-
13 empt—

14 (A) State trespass, contract, or tort law or
15 any civil action thereunder; or

16 (B) any provision of Federal, State, or
17 local criminal law or any civil remedy available
18 under such law that relates to acts of fraud or
19 theft perpetrated by means of the unauthorized
20 transmission of commercial electronic mail mes-
21 sages.

22 (3) LIMITATION ON EXCEPTIONS.—Paragraph
23 (2) does not apply to a State or local government
24 statute, regulation, or rule that directly regulates
25 unsolicited commercial electronic mail and that

1 treats the mere sending of unsolicited commercial
2 electronic mail in a manner that complies with this
3 Act as sufficient to constitute a violation of such
4 statute, regulation, or rule or to create a cause of
5 action thereunder.

6 (c) NO EFFECT ON POLICIES OF PROVIDERS OF
7 INTERNET ACCESS SERVICE.—Nothing in this Act shall
8 be construed to have any effect on the lawfulness or un-
9 lawfulness, under any other provision of law, of the adop-
10 tion, implementation, or enforcement by a provider of
11 Internet access service of a policy of declining to transmit,
12 route, relay, handle, or store certain types of electronic
13 mail messages.

14 **SEC. 8. STUDY OF EFFECTS OF UNSOLICITED COMMERCIAL**
15 **ELECTRONIC MAIL.**

16 (a) IN GENERAL.—Not later than 24 months after
17 the date of the enactment of this Act, the Commission,
18 in consultation with the Department of Justice and other
19 appropriate agencies, shall submit a report to the Con-
20 gress that provides a detailed analysis of the effectiveness
21 and enforcement of the provisions of this Act and the need
22 (if any) for the Congress to modify such provisions.

23 (b) REQUIRED ANALYSIS.—The Commission shall in-
24 clude in the report required by subsection (a) an analysis
25 of the extent to which technological and marketplace de-

1 velopments, including changes in the nature of the devices
2 through which consumers access their electronic mail mes-
3 sages, may affect the practicality and effectiveness of the
4 provisions of this Act.

5 **SEC. 9 SEPARABILITY.**

6 If any provision of this Act or the application thereof
7 to any person or circumstance is held invalid, the remain-
8 der of this Act and the application of such provision to
9 other persons or circumstances shall not be affected.

10 **SEC. 10. EFFECTIVE DATE.**

11 The provisions of this Act shall take effect 120 days
12 after the date of the enactment of this Act.

